

No. 13094.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ANTONE PAGLIERO and ARTHUR PAGLIERO, general partners, doing business as TECHNICAL PORCELAIN & CHINAWARE Co.,

*Appellants,*

*vs.*

WALLACE CHINA Co., LTD., a corporation,

*Appellee.*

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## BRIEF FOR APPELLEE.

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**BRIEF FOR APPELLEE.**

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**INTRODUCTION.**

Appellants, the Paglieros (defendants below\*) partners doing business as Technical Porcelain & Chinaware Co., have appealed from an interlocutory judgment granting a preliminary injunction restraining the appellants from making and selling china bearing patterns exemplified by

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\*The parties shall be referred to as plaintiff and defendants. The references to the record shall be by R. followed by page number. Emphasized matter in decisions is by plaintiff-appellee.

Exhibits 3, 9, 11 and 13 and from using plaintiff's trade names or trade marks, "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" in the identification of such hotel chinaware [R. 91]. The interlocutory judgment and preliminary injunction were granted upon a motion for preliminary injunction and order to show cause, after a hearing during which appellants introduced testimony.

It is submitted that on the facts before the Trial Court the interlocutory judgment was proper, the findings of fact and conclusions of law [R. 83-88] were amply supported by the record, and this Court should affirm the Trial Court.

## JURISDICTION.

Plaintiff (Wallace China Co., Ltd.) and defendants are both citizens and residents of California; there is no diversity of citizenship. The Federal Courts have jurisdiction because this is an action for infringement of trade marks and unfair competition and the amount in controversy exceeds \$3,000 [R. 4]. The Federal Courts have jurisdiction under the provisions of the Lanham Act of July 5, 1946, 15 U. S. C. A., Sections 1051-1127, and 28 U. S. C. A., Sections 1337 and 1338. It is submitted that the question of jurisdiction has been conclusively determined by this Court's ruling in *Stauffer v. Exley*, 184 F. 2d 962 (C. A. 9).



## BRIEF STATEMENT OF THE CASE.

Plaintiff is a California corporation with a plant near Los Angeles, California. Plaintiff has been engaged for many years in the manufacture and sale of vitrified hotel china which is sold through many dealers throughout California and throughout the western part of the United States and the Territory of Hawaii [R. 4; Wood Affidavit, R. 38]. Approximately 40% of its hotel china is shipped to dealers outside the State of California and is therefore in interstate commerce.

Hotel china is sold by its attractive appearance. Plaintiff has employed artists who have conceived and drawn new, original and distinctive designs or patterns which are then applied to the hotel chinaware made by plaintiff. Plaintiff was the first to appropriate certain trade marks or trade names for the identification of its china, the names in question being "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia." These trade names are used in identifying specific and distinctive patterns originated by plaintiff.

By reason of the attractiveness of these four patterns, the quality of the china, and the advertising and distribution by plaintiff, these four patterns and trade names became very popular and valuable. Good will and reputation were built up in the patterns and trade names. The record before the Trial Court showed that the trade associated these patterns and trade names with plaintiff. They recognized the patterns as indicating origin of the hotel china with plaintiff [R. 6; Affidavits of Elster, R. 26, 27; Robertson, R. 35-36; Delany, R. 47].

Defendant partnership, also engaged in the manufacture and sale of hotel china, **copied plaintiffs' distinctive**

patterns and sold them under the same trade names or trade marks as had been previously appropriated by plaintiff. Defendant partnership sold the copies within the State of California and in interstate commerce. Purchasers were confused by such copies. Former purchasers of plaintiff purchased defendants' copies, believing them to originate with plaintiff and then complained to plaintiff when the copies developed faults.

Upon considering the verified complaint and numerous affidavits, after inspecting the physical exhibits, and listening to argument by counsel, and after considering the applicable rules of law, the Trial Judge (Honorable Edward P. Murphy) granted the Motion for Preliminary Injunction and made appropriate Findings of Fact and Conclusions of Law [R. 83-88].

Unless defendants can show that the findings are in substantial error, the judgment must be affirmed. Actually, defendants do not contend that the findings are in error and their argument is only directed to the conclusion reached; the facts compel affirmation of the interlocutory judgment.

"Nowhere in appellant's brief is there a contention that the district court's findings are erroneous; instead, the argument is directed to the trial court's failure to find that the enumerated concepts constituted invention."

*R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc.*, 151 F. 2d 432, 434 (C. A. 9).

## BRIEF SUMMARY OF PLAINTIFF'S ARGUMENT.

It is submitted that the Trial Court properly granted the interlocutory judgment and preliminary injunction.

- (1) Trade marks and trade names constitute property rights which the courts protect.
- (2) The dress or appearance of an article, which purchasers recognize and associate with plaintiff, is a property right, and the courts will restrain an imitator to prevent deception of the public and damage to plaintiff.
- (3) By copying plaintiff's patterns and selling them under plaintiff's trade names, defendants have violated plaintiff's rights; their conduct constitutes unfair competition; it is an attempt to unjustly enrich themselves and to misappropriate plaintiff's good will and business.
- (4) The Trial Court had jurisdiction.
- (5) Each finding of fact made by the Trial Court is supported by the record and exhibits. There was no abuse of discretion.

## THE RECORD COMPELS THE ISSUANCE OF INJUNCTION RESTRAINING DEFENDANTS.

Defendants' quibbling with words renders their brief so confused and self-contradictory that it falls flat and is of no help to either defendants or your Honors.

The following verified facts represent the record before the Trial Court and which impelled the Court to issue a preliminary injunction.

- (1) Plaintiff appropriated and used the specified trade names or trade marks to indicate the nature, quality and source of its china [R. 5]. These marks were **"first appropriated and used by plaintiff"** [R. 6 and 9; Wood Affidavit, R. 43].
- (2) These trade names, "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" "have acquired and represent a large and valuable good will and reputation and are associated with and recognized by the purchasing public as representing china originating with plaintiff." [R. 6; Affidavits of Elster, R. 26, 27; Stein, R. 34, and Delany, R. 46, 47.]
- (3) Plaintiff employed artists and developed distinctive and attractive patterns [R. 5]. These patterns were **"originated and popularized by plaintiff \* \* \*"** [R. 6; Affidavit of Wood "distinctive patterns originated by deponent's corporation," R. 39].
- (4) These distinctive patterns were recognized by the public as indicating plaintiff's china [R. 6; Affidavits of Elster, R. 26, 27; Robertson, R. 35, 36; Delany, R. 47].

(5) Defendants copied plaintiff's patterns, marked their containers with the same trade marks as used by plaintiff and referred to the china by plaintiff's names. [Compare Exs. 1 and 2, R. 12 and 13; compare Exs. 5 and 6, R. 16 and 17; compare Exs. 9 and 10, R. 56 and 57.] “\* \* \* china sold by defendants bears a willful, deceptive copy of plaintiff's original patterns and is a fraud upon the purchasing public, \* \* \*” [R. 7]. “\* \* \* the sale of china by defendants under the trade names first appropriated and used by plaintiff is calculated to deceive the public \* \* \*” [R. 9; Affidavits of Elster, R. 26-27; Delany, R. 49].

(6) The purchasers have been deceived [Affidavits of Robertson, R. 36; Wood, R. 49] and plaintiff has been damaged [R. 8 and 9; Affidavits of Elster, R. 29; Wood, R. 41 and Delany, R. 49-50].

In addition to these facts, the Trial Court had before it the physical, uncontroverted exhibits and the testimony of Messerschmitt to the effect that he had made the cylinders for the “Shadowleaf” pattern for plaintiff and **later made similar cylinders for defendants** [R. 124], admitting

“I would say that a duplication of that pattern is very close” [R. 125].

This action is based upon the principle that equity will not permit one to unjustly enrich himself at the expense of another. It involves overreaching and taking an unconscionable advantage.



Defendants' acts constitute an appropriation of plaintiff's property rights in its trade names and in the dress of its goods.

The Trial Court properly issued a preliminary injunction in the light of the authorities. The Court should not permit plaintiff's good will to be diluted and ultimately destroyed by defendants' unlawful acts.

"\* \* \* if the complainants be not protected by preliminary injunction against such use—if, in other words, that question be postponed to the final hearing—there is every inducement to the defendant to delay and prolong the litigation, continuing meanwhile the assaults upon the good will of the complainants, so that, even if final decree be at last rendered in favor of complainants, the good will will have been so seriously and irreparably injured, if not in great measure destroyed, as to leave the complainants practically without remedy."

*Garrett & Sons v. T. H. Garrett & Co.*, 78 Fed. 472, at 479 (C. A. 6).

## **EACH FINDING OF FACT IS SUPPORTED BY THE RECORD BEFORE THE TRIAL COURT.**

Defendants do not question plaintiff's existence as a corporation nor the fact that defendants are partners doing business as Technical Porcelain & Chinaware Co. [Findings 1 and 2, R. 83-84].

Defendants do not question that plaintiff manufactures the four patterns of hotel china in question and sells them in interstate commerce [Finding 4, R. 84] as alleged in the verified complaint [R. 4]. The sale in interstate commerce by plaintiff is confirmed in the affidavit of Wood [R. 38 and 41] and the affidavit of Delany [R.

45, 47]. Defendants sell hotel china in interstate commerce and in competition with plaintiff. Defendants' sale in interstate commerce is alleged in the verified complaint [R. 8] and substantiated by the affidavit of Clifford [R. 53]. This is not denied.

Finding 5 is not controverted. Plaintiff has adopted and used the trade names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" [R. 5; Wood Affidavit, R. 39; Delany Affidavit, R. 47].

Finding 6 is convincingly supported by the record. Defendants do not question that Exhibits 3, 9, 11 and 13 correctly represent chinaware bearing patterns sold by plaintiff under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" [Delany Affidavit, R. 47]. That these patterns were produced by plaintiff's artists and at plaintiff's expense is alleged in the verified complaint and supported by the affidavit of Wood [R. 39-40]. These trade marks are applied to the containers in which the hotel china is shipped as exemplified by Exhibit 2 [R. 16] and advertising matter, Exhibit 8 [R. 31].

These patterns and trade marks are well known in the trade and represent good will and reputation of plaintiff. They are recognized in the trade as indicating origin of the china in plaintiff [Affidavits of Wood, R. 38-39; Delany, R. 47 and Clifford, R. 52-53].

Finding 7 to the effect that defendants caused plaintiff's patterns to be copied and imitated and have sold such copies in interstate and intrastate commerce is also supported in the record. The physical exhibits afford irrefutable evidence of copying.

For many years plaintiff had had Garnier Engraving Co. of Los Angeles engrave certain cylinders or rollers

which plaintiff then used in making paper pattern transfers, such transfers being eventually applied to the hotel china. Mr. Messerschmitt, a partner of this engraving company, testified that he made a roll or cylinder for printing the "Shadowleaf" pattern for defendants long after plaintiff had the same pattern [R. 123-124]. Your Honors are asked to compare Exhibits 1 and 2 [R. 12 and 13]; one of these is plaintiff's and the other is the defendants'. It is evident that defendants' copy is a Chinese copy of plaintiff's pattern in general appearance, in arrangement of primary or foreground leaves, in arrangement of background leaves and even in minute details of shadowing.

"The only adequate explanation I can find for this almost exact reproduction of non-functional features is that the *defendant has set out deliberately to appropriate the business of plaintiff's customers*. And that it is in a fair way to do so, unless prevented by injunction, is reasonably clear from the affidavits submitted on this motion."

*Thayer Telkee Corp. v. Davenport-Taylor Mfg. Co.*, 46 F. 2d 559, 560.

Such slavish copying has deceived plaintiff's customers [Robertson Affidavit, R. 36].

The evidence also establishes that "Tweed," "Hibiscus," and "Magnolia" have been copied. For "Tweed," compare Exhibit 9 [R. 56, plaintiff's] with Exhibit 10 [R. 57. defendants']; for "Hibiscus" compare Exhibit 11 [R. 58] with Exhibit 12 [R. 59]; for "Magnolia" compare Exhibit 13 [R. 60] with Exhibit 14 [R. 61]. Substantial identity by this similarity is confirmed by the affidavits of Elster [R. 27-28], Robertson [R. 36], Delany [R. 49] and Clifford [R. 53].



The evidence therefore supports finding 7; Conclusion of Law V [R. 87] must follow in accordance with the authorities.

The Court found, in finding 8 [R. 85], that defendants have identified and referred to their copies of plaintiff's patterns by plaintiff's own trade names. This finding is based upon the record. Exhibit 7 is a copy of defendants' price list which shows on its face that defendants have sold and offered for sale hotel china under the names "Shadowleaf," "Tweed" and "Hibiscus." Exhibit 6 [R. 17] shows on its face that defendants have used plaintiff's trade marks on their shipping containers.

In view of these uncontrovertible facts, Conclusions of Law IV and V are the only conclusions that can be reached.

The Court also properly found [Finding 9, R. 86] that defendants were notified [R. 104] and persisted in continuing their acts in unfair competition. In order to prevent irreparable damage to plaintiff, the Trial Court issued a preliminary injunction.

**Since every finding of fact finds ample support in the record, the findings must be affirmed.**

Attention is called to the fact that the preliminary injunction was only directed to four specific patterns and four trade names. The injunction leaves defendants free to manufacture and sell the forty other patterns, colors, and styles listed on defendants' price list, Exhibit 7 [R. 18]. The injunction is therefore limited. It is necessary to protect plaintiff's good will, reputation and business; it did not cripple defendants by simply restraining them from reaping where they did not sow; it prevented defendants from unjustly enriching themselves at the expense of plaintiff.

FEDERAL COURTS HAVE JURISDICTION OF  
ACTIONS FOR UNFAIR COMPETITION  
WHERE INTERSTATE COMMERCE IS AF-  
FECTED.

Defendants' attack upon the jurisdiction of the District Court in this case is not made in good faith, because defendants have admitted

"*Stauffer v. Exley* is the leading case and the controlling case." [R. 105.]

"I realize that is the law of this case." [R. 115.]

Furthermore, defendants' answer and counterclaim filed herein states, on page 4, lines 31-32:

"3. This Court has jurisdiction under the Lanham Act of July 5, 1946, 15 U. S. C. A. §§1051-1127."

Honorable Circuit Judge Orr, speaking for your Honors (Chief Judge Denman and Circuit Judge Pope) conclusively determined the jurisdiction of Federal Courts under the Lanham Act in the case of *Stauffer v. Exley*, 184 F. 2d 962. The instant case is on all fours with the *Stauffer* case.

In the *Stauffer* case it was found that Stauffer was engaged in interstate commerce and used an **unregistered trade name**, "*Stauffer System*" (at 963). Here, the plaintiff Wallace is engaged in interstate commerce and uses unregistered trade names or trade marks [Paragraphs 4 and 6, Verified Complaint; R. 4 and 5; also Affidavits of Elster, R. 26; Wood, R. 38, and Delany, R. 45. 47.]

In the *Stauffer* case your Honors stated:

"Under the present Act, however, it need only be proved that the infringer has used the copy or imi-

tation in commerce which Congress has the power to regulate. An infringement committed in intrastate commerce but affecting interstate commerce could clearly be regulated by Congress and thus would be within the present Act.” (at 966)

Defendants’ brief does not deny the fact that defendants have sold the unlawful copies under plaintiff’s trade names in interstate commerce. The Trial Court had before it the verified complaint and affidavits in which such acts by defendants are alleged: “\* \* \* used by defendants upon china sold by defendants in interstate and intrastate commerce.” [R. 7 and affidavit of Clifford, R. 53.] Defendants’ price lists, such as Exhibits 7 [R. 18 and 19] have been distributed interstate.

The facts in the instant case are stronger than those in the *Stauffer* case, because in addition to actual misappropriation of plaintiff’s trade marks, we here have a defendant who deliberately copied the designs and appearance of the goods by duplicating the patterns originated by plaintiff. This results in deception and confusion of purchasers. It is squarely within the prohibition of the Paris Convention which states in Article 10, Bis:

“(2) Every act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.

“(3) The following particularly are to be forbidden:

“1°. All acts whatsoever of a nature to create confusion by no matter what means with the establishment, the goods, or the services of the competitor; \* \* \*.”

These provisions are part of the Lanham Act, because 15 U. S. C. A. § 1127 states:

“The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; \* \* \* and to provide rights and remedies stipulated by treaties and conventions respecting trade marks, trade names and unfair competition entered into between the United States and foreign nations.”

Since *Stauffer v. Exley* is admittedly the law of this case and by reason of the clear language of the Act itself, pages 12-23 of defendants-appellants' brief are a baseless and false argument and can be disregarded.

Reaffirmation of the jurisdictional authority is also to be found in 15 U. S. C. A., Sec. 1121, which specifically provides that the District Courts of the United States shall have original jurisdiction:

“\* \* \* of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.”

as well as in 28 U. S. C. A. § 1337 which states:

“District courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

Defendants cannot question the power of the District Court to issue an injunction. It is therefore submitted that the Trial Court had jurisdiction and, in view of the facts before it, properly issued the preliminary injunction restraining the defendants from their unlawful use of plaintiff's marks and from the misappropriation of plaintiff's distinctive patterns which imparted a characteristic and unique dress to their chinaware.

THE PRINCIPLES APPLICABLE TO THIS CASE ARE ENUNCIATED BY THE FOLLOWING AUTHORITIES AND WERE PROPERLY APPLIED BY THE TRIAL COURT.

- (1) Trade Marks and Trade Names Constitute a Property Right and Represent Good Will. Plaintiff's Rights Require Protection.

"The redress that is accorded in trade mark cases is based upon the party's right to be protected in the good will of a trade or business. \* \* \* Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade marks adopted to maintain it."

*Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 412.

Also see:

*Tillman & Bendel v. California Packing Corp.*, 63 F. 2d 498 (C. A. 9);

*Carolina Pines v. Catalina Pines*, 128 Cal. App. 84;

*Lane-Bryant Inc. v. Maternity Lane Ltd.*, 173 F. 2d 559;

*Banzhof v. Chase*, 150 Cal. 180;

*Safeway Stores Inc. v. Dunnell*, 172 F. 2d 649 (C. A. 9).

"It is also to be borne in mind that the rules of unfair competition are based not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit. (*Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F. (2d) 603.)"

*American Philatelic Soc. v. Claibourne*, 3 Cal. 2d 689, at 698, 46 P. 2d 135.



(2) The Use of Identical Trade Marks by Defendants  
Raises the Presumption of Fraud by Defendants.

“\* \* \* Just why the defendant should endeavor to sell its product under names so strikingly similar to those long employed by the plaintiffs, is not readily discernible, unless it was for the purpose of capitalizing upon the good will and reputation of the plaintiffs.”

*Weiner v. National Tinsel Mfg. Co.*, 123 F. 2d 96,  
98 (C. A. 7).

“The decisions frequently refer to this sort of imitation as ‘reaping where one has not sown’ or as ‘riding the coattails’ of a senior appropriator of a trade name.

“By whatever name it is called, equity frowns upon such business methods, and in proper cases will grant an injunction to the rightful use of the trade name.”

*Stork Restaurant, Inc. v. Sahati*, 166 F. 2d 348,  
357 (C. A. 9).

(3) Plaintiff Has a Property Right in the Patterns  
Originated and Used by Plaintiff on Its Goods.

“\* \* \* There is no dispute between plaintiff and defendant as to the law that the plaintiff is entitled to recover in an action for unfair competition when the defendant, a competitor, has unnecessarily and knowingly imitated his rival’s devices to such an extent that purchasers are likely to be deceived by the resemblance of the devices, and where the general appearance of the devices are practically the same,

unless the points of resemblance are the necessary result of functional requirements. *Rushmore v. Manhattan Screw & Stamping Works (C. C. A.)*, 163 F. 939, 19 L. R. A. (N. S.) 269; *Lovell-McConnell Mfg. Co. v. American Ever-Ready Co. (C. C. A.)*, 195 F. 931; *Rushmore v. Badger Brass Mfg. Co. (C. C. A.)*, 198 F. 379.”

*McGill Mfg. Co. v. Leviton Mfg. Co.*, 43 F. 2d 607, 608.

Also see:

*Wm. H. Keller, Inc. v. Chicago Pneumatic Tool Co.*, 298 Fed. 52, 57 (C. A. 7);

*Krem-Ko Co. v. R. G. Miller & Sons, Inc.*, 68 F. 2d 872 (C. A. 2);

*Stewart v. Hudson*, 222 Fed. 584, 587;

*Baldwin et al. v. Grice Bros. Co.*, 215 Fed. 735, 737.

“It has been held to apply to misappropriation as well as misrepresentation, to the selling of another’s goods as one’s own—to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U. S. 215, 241, 242, 63 L. Ed. 211, 221, 222, 39 S. Ct. 68, 2 A. L. R. 293. Unfairness in competition has been predicated on acts which be outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law.”

*Schechter v. U. S.*, 295 U. S. 531, 532, 79 L. Ed. 1570, 1581.

(4) Injunctive Relief Is Granted When a Defendant Copies the Appearance of Plaintiff's Article and Appropriates Good Will Associated Therewith.

Note that in the instant case, the decoration or patterns originated by plaintiff impart eye-appeal and salability to the china.

In each of the following cases injunctions were issued because the appearance of an article had been copied by the defendant:

*Rymer v. Anchor Stove & Range Co.*, 70 F. 2d 386 (C. A. 6) (stove);

*Buck's Stove & Range Co. v. Kiechle*, 76 Fed. 758 (stove);

*Enterprise Mfg. Co. v. Landers, Frary & Clark*, 131 Fed. 240 (C. A. 2) (grinding mill);

*Art Metal Works v. Cunningham*, 137 Misc. 429, 242 N. Y. Supp. 294 (lighters and atomizers);

*George G. Fox Co. v. Wm. J. Glynn*, 191 Mass. 344 (loaf of bread);

*Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37 (C. A. 2) (padlock);

*Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939 (spotlight);

*Lovell-McConnell Mfg. Co. v. American Ever-Ready Co.*, 195 Fed. 931 (auto horn);

*Wesson v. Galef*, 286 Fed. 621 (decoration on revolver);

*Socony-Vacuum Oil Co. v. Rosen*, 108 F. 2d 632 (C. A. 6) (appearance on container);

*F. W. Fitch Co. v. Camille, Inc.*, 106 F. 2d 635 (C. A. 8) (hosiery package);



*My-T-Fine Corp. v. Samuels*, 69 F. 2d 76 (padding package);

*Luminous Unit Co. v. R. Williamson & Co.*, 241 Fed. 265, *affd.* 245 Fed. 988 (lighting fixture);

*Ilg Electric Ventilating Co. v. Evry-Use Products, Inc.*, 21 Fed. Supp. 845 (ornamentation on a blower);

*Prince Matchabelli v. Anhalt & Co.*, 40 Fed. Supp. 848 (appearance of purse kit);

*Thayer Telkee Corp. v. Davenport-Taylor Mfg. Co.*, 46 F. 2d 559 (appearance of a key cabinet);

*Chesebrough Mfg. Co. v. Old Gold Chemical Co.*, 70 F. 2d 383 (C. A. 6) (cartons and labels);

*Grant v. California Bench Co.*, 76 Cal. App. 2d 706 (waiting bench).

“The question is whether the natural and probable result of the use by the defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions \* \* \*.”

*Notaseme Hosiery Co. v. Straus*, 201 Fed. 99, 100 (C. A. 2).

#### (5) A Fraudulent Intent Is Presumed From the Identity in Appearance and Words.

In cases of unfair competition

“\* \* \* the question of intent to deceive is involved though it is not necessary to prove it by direct evidence. It may be inferred from circumstances and will be presumed where the resemblance is patent and the probability of confusion obvious.”

*Socony-Vacuum Oil Co. v. Rosen*, 108 F. 2d 632, 636 (C. A. 6).

“\* \* \* It is elementary law that, when the simulation of well-known and distinctive features is so close, the court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, \* \* \*.”

*Enterprise Mfg. Co. v. Landers, Frary & Clark*,  
131 Fed. 240, 241 (C. A. 2).

“A person intends the ordinary consequence of his voluntary act.”

Calif. Code Civ. Proc., Sec. 1963(3).

### THE CASES CITED BY DEFENDANTS ARE NOT PERTINENT.

Decisions of an administrative official of the Patent Office (*Ex parte American Map Co.*) or those relating to the registrability of a word (*In re Lyndale Farm*) such as the geographic word “Lackawanna” in *Canal Co. v. Clark*, are of no value or interest here.

*Chamberlain v. Columbia Pictures Corp.*, 186 F. 2d 923, reiterates the rule of the *Stauffer* case; it affirmed an order dismissing the complaint because there was no direct injury to rights of the plaintiff, and defendant’s acts did not result in the sale of goods as those of plaintiff because plaintiff’s purported rights and defendant’s motion picture were entirely non-competing and unrelated. In the instant case there is direct competition—both parties sell hotel china to the same dealers and there has been deception of purchasers.

The instant case has no similarity to an action to cancel trade marks like “Goldilocks” or “Red Riding Hood”

for dolls (names applied to dolls for over fifty years), as in *Dollycraft Co. v. Nancy Ann Storybook Dolls*. Plaintiff, in *Verney Corp. v. Rose Fabric Corp.*, 87 Fed. Supp. 802, had elected to avail itself of protection under Copyright laws but failed to apply the copyright notice and thereby lost its rights; that is not the case here.

Plaintiff has no quarrel with the United States Supreme Court cases cited by defendants; each case is bottomed on its own facts; their facts are totally different from those in the instant case.

The only pertinent case referred to by the defendants is *Wilson & Co., Inc. v. The Best Foods, Inc.*, 300 Fed. 484 (C. A. 9); this case is quoted hereafter.

**THE ISSUANCE OF AN INJUNCTION IS DISCRETIONARY WITH THE TRIAL COURT AND IS NOT DISTURBED UNLESS TOTALLY UNSUPPORTED BY THE RECORD.**

The above rule has been reiterated by many Courts of Appeal, including the Ninth Circuit. It is submitted that the present appeal should be dismissed with costs herein awarded to plaintiff, because defendants knew this rule full well and cited *Wilson & Co., Inc. v. The Best Foods, Inc.*, 300 Fed. 484 (C. A. 9), in its brief. The *Wilson* case involved a complaint for trade-mark infringement and unfair competition. Upon motion, the trial court granted a preliminary injunction and defendant appealed, as here. Your Honors affirmed the propriety of the injunction and stated:

“Upon such a question the well-settled rule is that the appellate court will not reverse the order of the court below unless it is made to appear that the court

abused the discretion with which it was invested. The decisions to that effect are so numerous that it will be enough to cite two made by this court. *Southern Pacific Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *Twenty-One Mining Co. v. Original Sixteen to One Mine, Inc.*, 240 Fed. 106, 110, 153 C. C. A. 142.” (P. 486.)

\* \* \* \* \*

“\* \* \* that the similarity of the trade-marks and cartons of the respective parties was such that the court below cannot be properly held to have abused its discretion in granting the preliminary injunction complained of. \* \* \*” (P. 488.)

Even more direct language was used by your Honors in *Owens v. Perkins Oil Well Cementing Co.*, 2 F. 2d 247, wherein the following was quoted with approval:

“‘The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the rules and principles of equity established for its guidance, *its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion*. The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below?’ *American Grain Separator Co. v. Twin City Separator Co.*, 202 F. 202, 206, 120 C. C. A. 644, 648.

“‘A *pendente lite* injunctive order will not be reversed unless there was an abuse of discretion; and

this can only appear from an obvious misunderstanding of the facts or a palpable misapplication of well-settled rules of law on the part of the trial judge.' City of Chicago v. Fox Film Corp., 251 Fed. 883, 164 C. C. A. 99. See, also, Wilson & Co. v. Best Foods, Inc. (C. C. A.), 300 F. 484."

## SUMMARY AND CONCLUSION.

It is respectfully submitted that:

- (1) The Trial Court had jurisdiction and had the power to grant a preliminary injunction;
- (2) The findings are amply supported by the record;
- (3) The rules of law have been correctly applied by the Trial Court;
- (4) There was no abuse of discretion by the Trial Court;
- (5) The judgment of the Trial Court should be affirmed; and
- (6) Plaintiff should be awarded all costs incurred in this baseless appeal, since the record shows that defendants-appellants knew the applicable rules of law and apparently presented this appeal only for purposes of harassment and delay.

Dated at Los Angeles, California, this 22nd day of January, 1952.

Respectfully submitted,

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